# Jurisdictional Statement

81-1164

Office-Supreme Court, U.S.
FILED
DEC 19 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

---

JOHN FRANKLIN HEIN, Appellant

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, Appellee

---

ON APPEAL FROM THE APPELLATE DEPARTMENT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

---

# JURISDICTIONAL STATEMENT

---

Thomas G. Becea
Post Office Box 608
La Jolla, CA 92038
(714) 454-4646
Counsel for Appellant

Howard C. Tarr
110 W. "C" Street,
Suite 2100
San Diego, CA 92101
(714) 233-7581
Associate Counsel

December 18, 1981

## QUESTION PRESENTED

Whether California Welfare and Institutions Code section 305(a) is repugnant to the Fourth Amendment of the Constitution of the United States when interpreted as legislative declaration of exigent circumstances per se authorizing police officers to enter a private residence with force, if necessary, without a warrant to take a minor into temporary custody when the parents are suspected of child abuse toward the minor.

---

Rule 15.1(b) footnote

The caption of the case in this Court names all the parties to the proceedings in the Superior Court Appellate Department whose judgment is sought to be reviewed. Brenda Marilyn Hein, appellant's spouse, was a party to the proceedings in the Municipal Trial Court where the complaint against her was dismissed in the plea bargain with appellant.

TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented..... | 1 |
| Table of Contents..... | 2 |
| Table of Authorities..... | 3 |
| Jurisdiction..... | 4 |
| Constitutional Provisions and Statutes.. | 6 |
| Statement of the Case..... | 8 |
| Substantial Question..... | 12 |
| Conclusion..... | 13 |

Appendix:

A. Reporter's Partial Transcript 12/5/80
Municipal Trial Court Ruling
Denying Motion to Suppress

B. Appellate Department Order 8/28/81
Affirming Trial Court Judgment

C. Appellate Department Order 9/21/81
Denying Petition for Rehearing

D. Municipal Trial Court Order 11/2/81
Modified Probation Order on Remand

E. Notice of Appeal filed 10/5/81
in Appellate Department and 10/6/81
in Municipal Trial Court

TABLE OF AUTHORITIES


Page

United States Constitution
Fourth Amendment..... 1, 6, 12

United States Statutes
Title 28 U.S.C. §1257(2)..... 4, 5

California Statutes
Penal Code section 1538.5(m)
(Deering 1981)..... 10
Welfare and Institutions Code
(Deering 1979)
Section 300..... 6
Section 305(a).... 1, 6, 8, 9, 10, 11

Cases
Cohen v. California (1970)
403 U.S. 15..... 5

Dahnke-Walker Milling Co.
v. Bondurant (1921)
257 U.S. 282..... 5

Lawrence v. State Tax Commission (1931)
266 U.S. 276..... 4

Payton v. New York (1980)
445 U.S. 573..... 9

## JURISDICTION

John Franklin Hein, the appellant, appeals from the final judgment of the Appellate Department of the Superior Court of the State of California for the County of San Diego, entered on August 28, 1981 affirming the order of the Municipal Court of California, County of San Diego, El Cajon Judicial District, denying appellant's motion to suppress evidence. The petition for rehearing and application for certification to the Court of Appeal, Fourth Appellate District, Division One were denied on September 21, 1981. The Notice of Appeal to the Supreme Court of the United States was filed on October 6, 1981 in the Municipal Court.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). An erroneous failure to pass on the federal constitutional objections to the state statute is treated as equivalent to a finding of validity within the meaning of §1257(2), so that an appeal will lie. Lawrence v. State Tax Commission, 266 U.S. 276,

282-283 (1931). The "validity" of a state statute is also said to have been sustained, within the meaning of §1257(2), when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); Cohen v. California, 403 U.S. 15, 17-18 (1970).

## CONSTITUTIONAL PROVISIONS AND STATUTES

### United States Constitution, Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### California Statutes

Welfare and Institutions Code Sections

305. PEACE OFFICER'S TAKING MINOR INTO TEMPORARY CUSTODY WITHOUT WARRANT. A peace officer may, without a warrant, take into temporary custody a minor:

(a) Who is under the age of 18 years when such officer has reasonable cause for believing that such minor is a person described in Section 300.

300. PERSON SUBJECT TO JURISDICTION OF JUVENILE COURT. Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court:

(a) Who is in need of proper and effective parental care or control and has no parent or guardian willing to exercise or capable of exercising such care and control, or

has no parent or guardian actually exercising such care or control. No parent shall be found to be incapable of exercising proper and effective parental care or control solely because of a physical disability, including, but not limited to, a defect in the visual or auditory functions of his or her body, unless the court finds that the disability prevents the parent from exercising such care or control.

(b) Who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode.

(c) Who is physically dangerous to the public because of a mental or physical deficiency, disorder, or abnormality.

(d) Whose home is an unfit place for him by reason of neglect, cruelty, depravity, or physical abuse of either of his parents, or of his guardian or other person in whose custody or care he is.

## STATEMENT OF THE CASE

Police came to appellant's residence without a search or arrest warrant seeking entry to investigate a third person report of suspected child abuse inflicted on a minor daughter by the appellant. Appellant refused consent denying the police entry, whereupon the police forcibly arrested[1] the appellant, rendered unconscious with a chokehold to gain entry, and removed the minor from the residence against her wishes and the protests of the parents, taking the minor into temporary custody under the claimed authority of California Welfare and Institutions Code section 305(a). A misdemeanor criminal complaint[2] was filed against appellant (Counts I, II, and III) and his spouse (Counts I and III). No

---

[1]Appellant was arrested for child abuse and resisting the police performance of duty.

[2]Complaint counts: I Contributing to Delinquency; II Resisting Police; III Compulsory School Attendance Violation.

civil juvenile proceedings were initiated with regard to the minor child.

A pretrial motion to suppress was brought on federal constitutional objections in the El Cajon Municipal Court by the appellant and his spouse to exclude related police temtimonial evidence of all conversations and observations at appellant's residence as comprising an illegal search and/or the result of the nonconsensual forcible warrantless entry and taking of the minor as comprising an illegal seizure. The trial court denied the motion, ruling that section 305(a) passed constitutional muster within the Fourth Amendment standard of reasonableness and constituted legislative declaration of exigent circumstances per se within the rule of Payton v. New York, 445 U.S. 573 (1980) thereby authorizing and justifying the warrantless police entry of appellant's residence, without consent and by force, to take the minor into temporary custody. A copy of the partial

transcript of the trial court ruling on appellant's motion is contained in the Appendix. Thereafter, appellant accepted a plea bargain pleading guilty to Count II of the complaint by delaying the police. Counts I and III against appellant and his spouse, the entire complaint as to the spouse, were dismissed. The trial court suspended sentence and imposed probation.

Pursuant to California Penal Code section 1538.5(m), appellant brought a timely appeal in the Appellate Department of the San Diego Superior Court seeking further review of the validity of the search and seizure. The Appellate Department affirmed the trial court conviction, ruling that appellant's federal constitutional objections to the validity of California Welfare and Institutions Code section 305(a) were barred by the plea of guilty and that the facts underlying Count II were not the fruits of a search or seizure, without ruling whether or not section 305(a) as interpreted by the trial court was

constitutionally valid. On petition for rehearing and application for certification to the California Court of Appeal, the appellant again raised federal constitutional objections to section 305(a). Appellant's petition and application were summarily denied.

## THE QUESTION IS SUBSTANTIAL

The question raised in this appeal has implication reaching beyond California throughout the United States. The nation's courts, social services departments and law enforcement agencies are vitally concerned with child abuse prevention and intercession before serious harm befalls the child. The instant case pits these worthy goals against rights no less important to society, the family unit integrity and freedom from invasion of privacy, and the private citizen's security in his/her person and home from unreasonable search and seizure. Police violation of Fourth Amendment protection is no less objectionable when under color of law or when the specter of child abuse raises its ugly head. The state cannot legislate exigency per se to circumvent the Fourth Amendment. In the absence of exigent circumstances as defined by the courts, the evils which lurk behind doors do not by their offensive nature dim the bright line at the

residence doorsill which police may not cross without a warrant. If the California legislature has indeed authorized such warrantless police entry into the homes of its citizens, the statute constitutionality should be tested against federal standards by this Court.

## CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal for plenary consideration on the merits.

Respectfully submitted,

Thomas G. Becea
Counsel for Appellant

Howard C. Tarr
Associate Counsel

December 18, 1981

No. C97471A

IN THE MUNICIPAL COURT

EL CAJON JUDICIAL DISTRICT

COUNTY OF SAN DIEGO, STATE OF CALIFORNIA

DEPARTMENT 4 BEFORE HON. RICHARD H. BEIN

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| JOHN FRANKLIN HEIN and BRENDA MARILYN HEIN, | ) |
| Defendants. | ) |

Reporter's Partial Transcript
Taken at El Cajon, California
December 5, 1980

Appendix A

December 5, 1980
4:50 P.M.
El Cajon, California

THE COURT: Counsel, I'm going to give my ruling now; and again, I'm able to do that because of the work both parties did, and I compliment you for the work that you brought to me so that I could read the relevant cases and such.

I'm denying the Motion. I'm going to give some reasons for it. Perhaps I shouldn't; I don't know, but I'm going to give some reasons, not necessarily in the order of their importance or as I would if I were drafting an opinion, because I'm not articulating that well. But, I think for your own guidelines I should do that, unless you prefer that I not.

MR. BECEA: We wish the specific ruling, your Honor.

MR. AVILA: I have no objection, your Honor.

THE COURT: Again, I want to emphasize

this is not in the order or sequence of importance. It's not to the exclusion of the other authorities, but we are very short in time. I want to certainly give the ruling so that you'll be guided as to how we may be proceeding on next Monday when we hear the Demurrer and the Motion to Strike. At least we'll resolve this Motion. Again, I don't know how well I'm going to articulate those things.

Mr. Tarr, what you say is a trueism in the sense that the mere assertion of a constitutional right cannot give cause for somebody to take action in contravention of that right because if that were the case, there would be no right. Its mere assertion would become its waiver and that of course is nonsecular. I appreciate that, and your logic is unassailable. However, I think it is equally unassailable that the unlawful assertion of a right does not abrogate another person's lawful right. We're saying the same thing. In

other words, you urge that for Mr. Hein to assert a right does not give Officer Heath, by the assertion of that right, authority to over -- to abrogate that right. Same time, Mr. Hein's unlawful assertion that Officer Heath did not have a right to enter does not change Officer Heath's right. We're saying the same thing. That's the initial premise in that particular sense.

Also, let's understand that statutues are subordinate to the Constitution. A statute must pass constitutional muster. There's no question about that, the ultimate test of the Constitution is a statute; however, statutory provisions are manifestations or declarations by the legislature of public policy and of the concerns on behalf of the community in that regard. In other words, they're public declarations. As long as they pass constitutional muster, they are lawful. If they don't pass constitutional muster, they're unlawful. As long as they pass

constitutional muster, they are lawful.

In this particular case, I don't see the statutory provisions that are relevant that war with the Constitution at all. I see them entirely consistent. We are talking here about the right of juveniles: The protection of society, of our state, community, the protection that the State has given to juveniles. We are talking about the special class juveniles are given and within the State's parental powers. That's something that we all must keep in mind. We're not necessarily talking about Mr. Hein's rights alone, Officer Heath's rights alone. We're talking about the juvenile rights. The legislature has passed certain provisions for the protection of juveniles which protection overrides a parent's rights with regard to that juvenile. The state's parental powers override, in certain regards, the natural parent's power. In this case, also, the only thing that I have in this proceeding before me is whether or not the

conduct of Officer Heath was reasonable under the facts and circumstances known by and apparent to him at the time. I find all of the evidence absolutely consistent and indeed compelling, if not overwhelming, that all the information given to Officer Heath to give him probable cause to believe that within that residence there was a juvenile within the provisions of 300 of the Welfare and Institutions Code. I have absolutely no reservations about that. Given that finding and that cause, Section 305 gives him the right to enter that home without a warrant for the purposes of taking that juvenile in custody.

Now, I would agree, again, in this regard with Mr. Avila. I think Ramey -- I think 305 must be read consistent with Ramey. In think 305 has to pass constitutional muster, but I think 305 read in conjunction with Section 300. Three hundred is a legislative declaration of what are exigent circumstances; What are compelling circumstances which

warrant an officer's operating and taking action without the necessity of obtaining a warrant? I find the facts of this case, at least that Section 300 and 305, pass constitutional muster in their application in this case. Therefore, I find that Officer Heath had the right to enter that residence over the objection of Mr. and Mrs. Hein to determine and to take into custody, take into custody, exercise his rights under Section 305. I'm satisfied from all of the evidence -- and especially the evidence of both the Defendants -- I'm satisfied if there was not absolutely literal compliance, certainly there was substantial compliance in every sense of the word that Officer Heath complied with Section 844 of the Penal Code before he attempted to make this entry. He identified himself, stated his purpose, stated his authority. After complyint with 844 of the Penal Code, again, he has a right forcibly to enter that residence. And, again, I see that provision consistent with

Constitutional protection. He has, say, authority. We've done that. Again, I emphasize, even the Defendants corroborate Officer Heath in that particular regard. The Officer does not have to accept the statement of any person, much less a person that may be suspect with regard to what is or is not a present condition. We'd never be able to make an arrest in the field, I suppose, if that were the situation.

In this case, also, as far as the purposes of what is before me today, I would also find that Officer Heath was acting in good faith, and I see as evidence of the facts, that he was operating in good faith. The fact that he did not or the officers did not enter the residence for the purposes of making a search or look around or anything of that nature after they accomplished the purposes of Section 305, and that is take custody of the child, of the juvenile. I think this is a manifestation from which we can infer what

the intent was. It was conducted in good faith from all aspects.

I would also find in this case, based upon what the Motion as you presented to me, that in these observations that Officer Heath or Officer Naumann made in this case would have been attenuated as they relate to the juvenile if they had gotten a warrant. They made no observations of the house. They made no observations of the child other than they would have made had they obtained a warrant. So far as suppressing the evidence as far as the 148 aspect of it is concerned, obviously, if the Officer is there performing a lawful duty and he has a right to enter, that right cannot be interfered with. So, those are some of the reasons. As I said, perhaps not articulated as well as I'd like to, particularly in a case of review. I've often thought judges make mistakes when they try to explain themselves. Those are some of the reasons that I reached the conclusions that I did.

MR. BECEA: May I ask for one specificity on the ruling. The Court has indicated, for the record, it would be an important --

THE COURT: That's my ruling, Mr. Becea. I've given some of those reasons in support of my proposition. That's not to exclude any others.

MR. BECEA: I understand. Might I express the question at least for the record?

THE COURT: I've made my ruling.

MR. BECEA: May I, for the record, at least, ask a question?

THE COURT: I've made my ruling.

MR. BECEA: May I object then to the lack of specificity?

THE COURT: You may. You may object to the lack of specificity in the sense that as far as I'm concerned, you are entitled to no explanation.

MR. BECEA: Thank you.

THE COURT: You're entitled to a ruling. As a courtesy, I've given you the

benefit of some thoughts. That's a courtesy I extended to you. I'm sorry you misunderstood. I would not have extended the courtesy if I thought you were asserting some right to an explanation over and above my ruling. I don't know of any right to findings of fact and conclusion of law.

MR. BECEA: Might I explain the objection, at least?

THE COURT: State your objection.

MR. BECEA: For the record, I would object to the lack of a specific ruling as to what provisions of the Welfare and Institutions Code 300 the matter comes within.

THE COURT: As supported by the evidence, shown as the evidence.

MR. BECEA: I'm referring to the subsections.

THE COURT: The evidence will speak for itself as will the findings. There's no question in my mind that Officer Heath had probable cause to believe that there was a

child within that dwelling, within that residence. There's absolutely no question in my mind that fell with Section 300. There's absolutely no question in my mind. I don't know if I can be anymore specific than that.

---

SUPERIOR COURT NO. CR 53706

MUNICIPAL COURT NO. C 97471a

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

FILED AUG.28 1981

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA, | ) |
| Plaintiff and Respondent, | ) |
| vs. | ) |
| JOHN FRANKLIN HEIN, | ) |
| Defendant and Appellant. | ) |

ORDER

The condition of probation relating to inspection is reversed and remanded for reconsideration. The probation order is otherwise affirmed. Appellant's first five contentions are barred by the guilty plea. The facts underlying the Penal Code Section 148

conviction were not the fruits of a search or seizure. The central index is not before us. On remand the court shall ascertain whether there is a factual basis for child abuse probation conditions and, if so, specifically identify those empowered to inspect.

BY THE COURT

J. Perry Langford, P.J.

William T. Low, J.

Elizabeth Nay Zumwalt, J.

SUPERIOR COURT NO. CR 53706

MUNICIPAL COURT NO. C 97471a

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

FILED SEP 21 1981

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA, | ) |
| Plaintiff and Respondent, | ) |
| vs. | ) |
| JOHN FRANKLIN HEIN, | ) |
| Defendant and Appellant. | ) |

ORDER

Petition for rehearing is denied. Application for certification to the Court of Appeal, Fourth Appellate District, Division One is denied.

BY THE COURT

J. Perry Langford, P.J
William T. Low, J.
Elizabeth Nay Zumwalt, J.

Appendix C

No. C97471A

MUNICIPAL COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

EL CAJON JUDICIAL DISTRICT

| |
|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff,<br>vs.<br>HEIN, JOHN FRANKLIN<br>Defendant. |

MODIFIED PROBATION ORDER
PC 148 adj.

GOOD CAUSE APPEARING, probation in the above entitled case is hereby modified as follows; That the item No. 11 "Allow any authorized persons to inspect home to check on welfare of all children.", is hereby DELETED.
All other terms and conditions of probation remain the same as previously ordered.

RICHARD H. BIEN, Judge
Dated: November 21, 1981

Appendix D

SUPERIOR COURT NO. CR 53706

MUNICIPAL COURT NO. C 97471a

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

FILED OCT 5 1981 (APPELLATE DEPT.)

FILED OCT 6 1981 (MUNICIPAL COURT)

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA, | |
| Plaintiff and Respondent, | |
| vs. | |
| JOHN FRANKLIN HEIN, | |
| Defendant and Appellant. | |

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JOHN FRANKLIN HEIN, the appellant herein, hereby appeals to the Supreme Court of the United States from the final order of the above entitled Appellate Department of the Superior

Court entered on August 28, 1981, affirming the order of the El Cajon Municipal Court. Petition for rehearing was denied on September 21, 1981.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Thomas G. Becea

Howard C. Tarr

Attorneys for Appellant